

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

PHARMASTEM THERAPEUTICS, INC.,

Plaintiff,

v.

VIACELL, INC., OBSTETRICAL AND
GYNECOLOGICAL ASSOCIATES, P.A.,
FEMPARTNERS, INC., and CARITAS ST.
ELIZABETH'S MEDICAL CENTER OF
BOSTON, INC.,

CIVIL ACTION NO. 04-11673 (RWZ)

Defendants.

**VIACELL'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT FOR PATENT
INFRINGEMENT AND DEMAND FOR JURY TRIAL**

For its answer and defense, defendant ViaCell, Inc. ("ViaCell") responds to the numbered paragraphs of the Amended Complaint for Patent Infringement and Demand for Jury Trial ("Amended Complaint") filed by plaintiff PharmaStem Therapeutics, Inc. ("plaintiff") as follows:

THE PARTIES

1. Admitted on information and belief.
2. ViaCell admits that it is a Delaware corporation with a principal place of business located at 245 First Street, Cambridge, Massachusetts. ViaCell denies the remaining allegations of paragraph 2.
3. ViaCell states that it is without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph 3.
4. ViaCell states that it is without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph 4.

5. ViaCell states that it is without information or knowledge sufficient to form a belief as to the truth of the allegations of paragraph 5.

JURISDICTION AND VENUE

6. Admitted.

7. ViaCell admits that venue and personal jurisdiction are proper in this district but otherwise denies the remaining allegations of paragraph 7.

8. ViaCell admits that it is located in this district and that it entered into an agreement with Obstetrical and Gynecological Associates, P.A. (“OGA”) and FemPartners, Inc. (“FemPartners”). ViaCell denies the remaining allegations of paragraph 8.

PLAINTIFF’S PATENTS

9. ViaCell admits that the copy of the ‘645 patent as appended to the Amended Complaint states that plaintiff is the registered assignee of the ‘645 patent, that the application that led to the ‘645 patent was filed on May 16, 1990, and that the ‘645 patent issued on October 8, 2002. ViaCell denies the remaining allegations of paragraph 9.

10. ViaCell admits that the copy of the ‘427 patent as appended to the Amended Complaint states that plaintiff is the registered assignee of the ‘427 patent, that the application that led to the ‘427 patent was filed on May 16, 1995, and that the ‘427 patent issued on May 27, 2003. ViaCell denies the remaining allegations of paragraph 10.

11. ViaCell admits that the ‘645 and ‘427 patents are official documents that speak for themselves, and thus denies any characterizations thereof. ViaCell further states that the allegations of paragraph 11 pertain to claim construction which is an issue of law.

PATENT INFRINGEMENT

12. ViaCell admits that it sells the service of cryopreserving and storing umbilical cord blood. ViaCell further admits that ViaCord provides collection kits to its customers. ViaCell denies the remaining allegations of paragraph 12.

13. ViaCell admits that ViaCord receives collected cord blood at the ViaCord Processing Laboratory where the cord blood is cryopreserved in cryoprotected blood bags. ViaCell further admits that prior to cryopreserving the cord blood, limited testing is performed. ViaCell denies the remaining allegations of paragraph 13.

14. ViaCell admits that it entered into an agreement with OGA and FemPartners regarding cord blood collection. ViaCell denies the remaining allegations of paragraph 14.

15. Denied.

FIRST CAUSE OF ACTION
(Infringement of the ‘645 Patent)

16. ViaCell realleges each and every response set forth in paragraphs 1 through 15 and incorporates them herein by reference.

17. Denied.

18. Denied.

19. Denied.

SECOND CAUSE OF ACTION
(Infringement of the ‘427 Patent)

20. ViaCell realleges each and every response set forth in paragraphs 1 through 19 and incorporates them herein by reference.

21. Denied.

22. Denied.

23. Denied.

PRAYER FOR RELIEF

ViaCell states that all requested relief should be denied.

AFFIRMATIVE DEFENSES

As and for further defenses to this action, ViaCell states:

FIRST DEFENSE

The Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The ‘645 patent and the ‘427 patent are invalid because they fail to comply with the requirements of the patent laws of the United States, Title 35, United States Code Annotated, including, without limitation, §§ 101, *et seq.*

THIRD DEFENSE

ViaCell has not engaged and does not engage in any activities that infringe, contribute to the infringement, or induce infringement of any valid and enforceable claim of the ‘645 patent and the ‘427 patent.

FOURTH DEFENSE

Some or all of plaintiff’s claims are barred by the doctrine of prosecution history estoppel.

FIFTH DEFENSE

Some or all of plaintiff’s claims are barred by the doctrine of collateral estoppel or issue preclusion.

SIXTH DEFENSE

Some or all of plaintiff’s claims are barred by the doctrine of res judicata or claim preclusion.

SEVENTH DEFENSE

Some or all of plaintiff’s claims are barred by the doctrine of unclean hands and/or patent misuse.

EIGHTH DEFENSE

Some or all of plaintiff’s claims are barred by the doctrine of absolute and/or equitable intervening rights.

NINTH DEFENSE

ViaCell has not yet ascertained whether the ‘645 patent or the ‘427 patent were obtained through fraudulent or inequitable conduct. Accordingly, ViaCell reserves the right to plead a defense based on fraud or inequitable conduct.

TENTH DEFENSE

Plaintiff is barred by 35 U.S.C. § 287 from recovering damages for any alleged infringement of the ‘645 patent and the ‘427 patent that occurred before the filing of the complaint and notification to ViaCell alleging infringement of the ‘645 patent and the ‘427 patent.

VIACELL, INC.,

By its attorneys,

/s/ Elaine Herrmann Blais _____

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